

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

CEDRIC NICKERSON	§	
TDCJ-CID #681323	§	
v.	§	C.A. NO. C-11-097
	§	
RICHARD CRITES, ET AL.	§	

**MEMORANDUM AND RECOMMENDATION TO DENY  
PLAINTIFF'S MOTION TO PROCEED IN FORMA PAUPERIS**

Plaintiff is a state inmate who filed this civil rights action pursuant to 42 U.S.C. § 1983. (D.E. 1). Plaintiff filed a motion to proceed in forma pauperis as well as a current copy of his inmate trust fund account statement. (D.E. 5).

**I. THREE STRIKES RULE**

Prisoner civil rights actions are subject to the provisions of the Prison Litigation Reform Act ("PLRA), including the three strikes rule, 28 U.S.C. § 1915(g). The three strikes rule provides that a prisoner who has had, while incarcerated, three or more actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief can be granted is prohibited from bringing any more actions or appeals *in forma pauperis*. 28 U.S.C. § 1915(g); Banos v. O'Guin, 144 F.3d 883, 884 (5th Cir. 1998) (per curiam); Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). The three strikes rule provides an

exception permitting prisoners who are under imminent danger of physical harm to proceed without prepayment of the filing fee. 28 U.S.C. § 1915(g).

## **II. ANALYSIS**

Plaintiff Cedric Nickerson is also known as Cedric Pierre Webb. See United States v. Webb, No. 96-40570, 1997 WL 115286 (5th Cir. Feb. 24, 1997) (per curiam) (unpublished); Nickerson v. Doughty, No. 1:06cv374, 2007 WL 30897 (E.D. Tex. Jan. 4, 2007) (unpublished); Nickerson v. Crites, No. CC-08-122, 2009 WL 1545992 (S.D. Tex. Mar. 12, 2009) (unpublished); In re Nickerson, No. 13-04-376, 2004 WL 1837696 (Tex. App. Aug. 17, 2004) (per curiam) (unpublished); Nickerson v. State, No. 01-94-666-CR, 1995 WL 370300 (Tex. App. June 22, 1995) (per curiam) (unpublished). He has filed actions with a federal inmate number of 61939-079 as well as TDCJ inmate numbers of 463534 and 681323. (D.E. 1, at 5).

Plaintiff has had at least three prior actions dismissed as frivolous, malicious, or for failure to state a claim upon which relief can be granted. See United States v. Webb, 1997 WL 115286; Nickerson v. U.S. Marshal's Office, et al., No. 5:96cv235 (N.D. Tex. July 16, 1997); Nickerson v. Klevenhagen, No. 4:95cv4089 (S.D. Tex. Mar. 13, 2000); Nickerson v. Justices of the Texas Supreme Court, et al., No. 2:03cv411 (S.D. Tex. Dec. 2, 2003); Nickerson v. Castro, et al.,

No. 6:05cv139 (E.D. Tex. June 13, 2005); Nickerson v. Crites, 2009 WL 1545992; Nickerson v. Price, No. 6:09cv160, 2009 WL 1956284 (E.D. Tex. July 9, 2009).

Plaintiff is now barred from filing a civil suit unless he is in imminent danger of physical injury.

In this action, plaintiff is suing Richard Crites, a warden at the McConnell Unit, A. Gaitan; a classification officer at the McConnell Unit, Officer Silvas, a grievance investigator at the McConnell Unit; and James Fitts, a medical doctor at the McConnell Unit. (D.E. 1, at 4). He alleges that he was transferred to the McConnell Unit on August 8, 2007 because of physical threats at his previous unit. Id. at 5. He claimed that he told both Warden Crites and Officer Gaitan that if he were placed in general population, he would be at risk from Crips gang members. Id. They both denied his request for protective custody. Id. at 5-6. He alleges that on January 21, 2008 he was assaulted by Crips gang members. Id. at 6. He alleges that he had filed grievances with Officer Silvas which were not properly handled. Id. He alleges that Dr. Fitts denied him medical care in retaliation for filing grievances against him. Id. At the time he filed this action, plaintiff was incarcerated at the Clements Unit.

This Court must assess whether plaintiff is exposed to imminent danger of serious injury at the time that he filed his motion. Choyce v. Dominguez, 160 F.3d

1068, 1071 (5th Cir. 1998) (per curiam) (citing Banos, 144 F.3d at 884-85).


Courts have determined that in order to meet the imminent danger requirement of § 1915(g), the threat must be “real and proximate.” Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (citation omitted). The harm must be imminent or occurring at the time the complaint is filed, and the plaintiff must refer to a “genuine emergency” where “time is pressing.” Heimerman v. Litscher, 337 F.3d 781, 782 (7th Cir. 2003) (per curiam) (citation omitted). In passing the PLRA, Congress intended a safety valve to prevent impending harms, not those injuries which allegedly had already occurred. Abdul-Akbar v. McKelvie, 239 F.3d 307, 315 (3d Cir. 2001) (en banc). Plaintiff has not alleged any facts to suggest that he is in imminent danger of physical injury. Indeed, his claims all concern events alleged to have occurred at the McConnell Unit even though he was at the Clements Unit when he filed his action which removed the possibility that he was subject to any imminent danger.

### **III. RECOMMENDATION**

Plaintiff has lost the privilege of proceeding *in forma pauperis*, and he has failed to allege that he is in imminent danger of physical harm. Accordingly, it is respectfully recommended that plaintiff’s motion to proceed in forma pauperis, (D.E. 5), be denied. Furthermore, it is respectfully recommended that this action

be dismissed without prejudice. Finally, it is respectfully recommended that plaintiff be permitted to move to reinstate the lawsuit, but only if the \$350.00 filing fee is paid simultaneously with the motion to reinstate.

Respectfully submitted this 6th day of May 2011.



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BRIAN L. OWSLEY  
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1); Rule 72(b) of the Federal Rules of Civil Procedure; and Article IV, General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).